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SUBSEQUENT BIRTH OF CHILDREN AS A REVOCATION OF A WILL.

(CONCLUDED.)

WISCONSIN.

The Supreme Court of Wisconsin, in *In re Donje's Estate* (1899),[48] construing a statute substantially the same as that of Illinois, give to the word "provision" a meaning similar to that put upon it by the Illinois court in the case from which we have just quoted. This is the ablest opinion we have found on this subject, and presents the view towards which all the more recent decisions seem to be tending. By his will, the testator devised to his wife all his estate "to have and to hold the same until the youngest of my children, if any be born me, shall attain the age of twenty-one years." This was construed by the court as giving an estate in remainder, "perhaps contingent," to the testator's children, should any be born, upon the majority of the youngest. Two children were afterwards born, and they claimed under the statute, on the ground that the devise to them in the will was not a "present available provision for their support and maintenance." It was held, however, after a masterly review of the authorities in the several states, that this was a "provision" for them within the meaning of the Wisconsin statute. It was admitted that in Pennsylvania, and also in Maine and Rhode Island, a different doctrine prevails. But this was explained on the ground that the statute, in those states, "has a different *purpose*" (italics ours), "in that it attempts not only to make provision for children ove looked or unintentionally omitted by an ancestor, but restrains the power of a testator to disinherit (after-born) children at all; and such being the purpose and policy of the lesiglature, a very natural and proper construction would im-

[48] 79 N. W. 786.

port the word 'reasonable' as a qualification of the word 'provision.' "

In *Verrinder* v. *Winter*,[49] the testator, by his will, gave his wife two-thirds of his estate while she remained his widow, but if she married again, one-half of her share to go to "her heir." At the time of making his will, the testator was upon his death-bed and knew that death was at hand. He had no children living, but he knew that his wife was *enceinte*. The child being born after the testator's death, claimed to be pretermitted. The court held that by the word "heir" the testator referred to the after-born child who was at that time *en ventre sa mere*; that this being so, then the contingent remainder given him by the will was a "provision" within the meaning of the statute, or, if not, "then (the testator having intended to do just what the will declares) the will shows the intention of the testator not to make a provision for the child."[50]

VIRGINIA.

This clause of the Virginia statute had never until recently been construed. In the recent case of *Allison* v. *Allison's Ex'ors* (March, 1903), 9 Virginia Law Register, 278, 44 S. E. 904, a construction is placed upon the statute similar to that put upon it by the authorities above discussed. The material facts of the case were as follows: The testator, then a widower with one child, Mrs. Dora Moore, made his will, by which he gave the greater part of his estate to the said daughter for life, remainder at her death to her surviving children, but should no children survive her, or, surviving her, die under twenty-one years of age, remainder to the heirs at law of the testator. Later the testator married again, and afterwards he executed a codicil confirming his former will and giving $100,000 to trustees, to hold in trust for his wife for life, "and at her death to go to her child or children if there should be any by me; and if there should be no child or children by me, then to go to my legal heirs." Afterwards, a son, James Allison, was born, and the testator died without changing his will. The court construed each of these provisions as creating a vested remainder in the after-born child, James Allison. The question then arose whether a vested remainder limited after a life estate was such a provision as is contemplated by the statute. The exhaustive brief of counsel placed before the

[49] (Wis.), 73 N. W. 1007.

[50] The case of Bresee v. Stiles, 22 Wis. 120, is cited as bearing upon this subject.

court all the authorities, *pro* and *con*. The provision was held to be sufficient. Construing the statute, the court said:

"The statute does not require the testator to make provision for the child by placing him upon a footing of equality with other children or objects of his bounty, and the provision need not be adequate to his maintenance, education and support. The section under consideration (Code, sec. 2528) imposes no limitation upon the power of the parent; it merely declares how he shall exercise the unquestioned right to dispose of his property by will as he sees fit. This plainly appears from the language of the statute, for the testator may exclude the after-born child from all participation and enjoyment of any part of his property, but the intention to do so must be expressed. To pretermit is, to pass by; to omit; to disregard. If the intention to exclude appears upon the face of the will the child has not been omitted or passed by. If the child has been provided for by the will, the value of the provision is not the subject of enquiry by the court, for however inadequate the provision may be, it would yet be true that the child was not pretermitted, had not been omitted, passed by or disregarded. Such seems to be the plain language of our statute."

The court then reviews the decisions in other states, and concludes:

"Without the aid of any authority but relying only on established rules of construction to ascertain the meaning of our statute, we would be constrained to hold that any provision which afforded evidence that the child had not been forgotten was sufficient to prevent the application of the statute; that the statute did not intend to produce equality or to diminish the power of the testator, but merely to regulate its exercise, and that a vested remainder carrying with it a right of property, though postponing its actual enjoyment, answered the demands of the statute."

The above authorities are considered as establishing the doctrine that, at least outside of Pennsylvania, Maine and Rhode Island, by the word "provision" as used in the statutes, is meant any sort of disposition for, or mention of, the after-born child which shows that the testator had such child in mind when he made his will, and not necessarily a present, or vested, or substantial estate.[51]

And now, having presented the two doctrines which have gained a respectable footing, and having attempted to show that these two doctrines may possibly be reconciled on the ground that the statutes of the states adhering to the first of these doctrines were passed *diverso intuitu* from those of the states holding the second doctrine,

[51] See concordant Gay *v.* Gay (Ala.), 4 So. 42; Carpenter *v.* Snow (Mich.), 72 St. Rep. 576; Meares *v.* Meares (N. C.), 4 Ired. Law, 192.

we are confronted with the irreconcilable view taken by the Supreme Court of Ohio in the case of *Rhodes* v. *Weldy*.[52]

The decision was based upon two grounds: first, the reversionary character of the devise, and second, the insufficient designation of the after-born child as beneficiary under the will. It is respectfully submitted that neither of these grounds is tenable, though the space at our command permits only a statement of the opinion and not an attempted demonstration of its soundness.

The *facts* of the case were as follows: The testator, in August, 1862, being about to enter the army (where he died in 1865), made his will as follows:

"I will and devise to my wife, Harriet Young, all my real estate wherever situate, to use and occupy as to her may seem proper during her natural life, and after her death, to the heirs of her body begotten."

Then followed a limitation over in the event that the wife should die without issue. The testator, at the time of making the will, had no children, but his wife was then five months gone with the plaintiff, who was born in December, 1862.

It was held that the after-born child was not "provided for in the will," within the meaning of the Ohio statute (substantially same as Va. Code, sec. 2528), because the estate given, being a remainder limited upon a life estate in her mother, was no provision for the present support and maintenance; and because the devise to the "heirs of her (the testator's wife's) body begotten" was not a specific provision for the plaintiff, but merely a provision for a "class which happens to be broad enough to include her."

We have thus endeavored to show what is the true effect of the clause "not provided for" as used in the statutes under consideration. The conclusion reached is, that while in Pennsylvania, Maine and Rhode Island, whose statutes do not permit the testator to exclude an after-born child, some positively beneficial disposition is required, which will be available as a present means of support and maintenance for the after-born child, the better view, and that which may be considered as established, outside of the above-mentioned states, is that *any devise or bequest, which shows that the testator had the after-born child in mind, however inadequate its extent, or however remote its enjoyment, is sufficient to satisfy the requirements of the statute.*

[52] 46 Ohio St. 234.

Here, if we may be allowed to express our own opinion, we venture to predict that the rule established outside of Pennsylvania Maine and Rhode Island, will eventually become universal, and that even the courts of those states will recede from the construction which they have heretofore put upon the statute when a case arises in which it will be necessary for them to determine the *amount* or *extent* of the provision which the statute requires. None of the cases, so far, have involved this question. They have merely decided that the provision must be an estate *in presenti*. The letter of this requirement would be carried out by a legacy of one cent, thus making the statute a nullity. It will scarcely be contended that an after-born child must in every case be given an equal share with the rest of the testator's children. Yet, short of this, there is no stopping-place. For the courts to pretend to say exactly how much must be given to such child would be to substitute their own will for that of the testator, and this, it will not be denied, is beyond the rightful powers of any court.

Provision by Settlement.

The second exception made by the statutes to their operation is where the after-born child has been provided for by "settlement."

The statute is silent as to the *extent* of the provision by settlement, and we have found no case in which this question has been raised. On principle, it would seem that such provision ought to be *reasonable* in amount, having regard to the value of the testator's property, the number of persons dependent upon his bounty, and the amount given to his other children, if any. Otherwise, it would afford no presumption that the testator intended to pretermit such child in the will; and this seems to be the reason why this clause was put in the statute. For, as has been said before, the purpose of the statute was, not to require the testator to provide for an after-born child at all events, but merely to protect such child from an *unintentional* omission. If, therefore, a reasonable provision has been made for the after-born child by *settlement,* there is no reason why such child should be again provided for *in the will;* and the object of this clause seems to be to except such a case from the operation of the statute. But if the settlement upon the after-born child were grossly inadequate, and especially if the settlement had been made in favor of the testator's children, as a class, and the

other children, living when the will was made, were given additional sums by the will, while the unborn child was unnoticed therein, it would seem that in such case the after-born child ought to be entitled to claim under the statute, notwithstanding that he was included in the settlement.

It is probable that the legislature, when they used the word "settlement," had in mind a *marriage* settlement, as such settlements were very common in England and in the early days of our American colonies, when the statutes on this subject were first passed. But in *Stevens* v. *Shippen,*[53] it is said that the term includes, not only what is technically known as a "settlement," but any sort of provision made for an after-born child. In *Gay* v. *Gay,*[54] it is held that a provision by settlement may be made *after* as well as *before* the will.

This brings us to the discussion of the third and last exception made by the statutes to their operation, viz.: where an intention is shown to disinherit the after-born child.

INTENTION TO DISINHERIT.

The phraseology varies in the different states. In Virginia, it is ". . . nor expressly excluded by the will"—Code, sec. 2528.[55] In this, as in all questions of intention, no hard and fast rules can be laid down. Each case must stand upon its own bottom. The intention is to be gathered from the language of the will construed in the light of surrounding circumstances.[56] Of course, if the testator expressly states in his will that after-born children are not to have any part of his estate, there is no room for construction.[57]

But, outside of Pennsylvania, Maine and Rhode Island, where of course this question cannot arise, since the statute does not permit the testator to disinherit an after-born child at all, the tendency is to construe this clause of the statute liberally. It is not necessary that express words of exclusion be used. It is sufficient if an unmistakable intention to disinherit can be gathered from the whole will. Thus, in *Leonard* v. *Enochs, supra,* the testator having a child who was living with him when he made his will, and his wife being seven months gone with child who was afterwards born, devised his whole estate *to his wife,* not mentioning his children. Under these

[53] 28 N. J. Eq. 487, 534.
[54] 84 Ala. 38; 4 So. 42.
[55] See extracts from statutes, *supra.*
[56] See Leonard v. Enochs (Ky.), 17 S. W. 437.
[57] Prentiss v. Prentiss, 11 Allen, 47.

circumstances the after-born child was held to be intentionally excluded. The court said:

"It makes no difference in what form such intention may be expressed in the will. It may be by direct words of exclusion, or it may be gathered from the whole will that the testator intended to exclude the after-born child; and, if thus gathered, it is 'expressly excluded' by the will."

The court then recites the circumstances under which the will was made, emphasizing the facts that the testator had daily intercourse with his wife; that she was seven months advanced in pregnancy; that his living child, who was with him at the time, was given nothing by the will; and in the light of these circumstances concludes that the will giving all the testator's property to his wife amounted to an exclusion of the after-born child.[58]

This is an extremely liberal interpretation of the words "expressly excluded *by the will*," but it is in accord with the real purpose of the statute, which, as we have seen, is to provide for cases of *unintentional* omission only.

There are many cases holding that the mere *mention* of the after-born child in a will disposing of the testator's entire estate is a sufficient expression of an intention not to make any provision.[59] And this would seem to be reasonable; for, if the testator refers to the after-born child in such way as to show that he contemplated its birth, and then gives his whole estate to some one else, it is a necessary implication that he intended not to make any provision (in the will) for such child.[60]

The statute itself, in some states, requires only that the after-born child be "mentioned" in the will.[61]

Of course the mere omission to make provision for a child in the will is not sufficient expression of an intention to disinherit. This is the very case the statute was designed to meet. In such cases the presumption is that the child was *unintentionally* omitted.[62] The burden is then upon those seeking to show that the testator intended to disinherit the after-born child, to establish such intention.[63]

[58] See concordant Wilder *v.* Goss, 14 Mass. 357. *Contra*, Carpenter *v.* Snow (Mich.), 72 A. S. R. 526, and Chicago &c. R. Co. *v.* Wasserman, 22 Fed. 872.

[59] See Terry *v.* Foster, 1 Mass. 145; Wilder *v.* Goss, 14 Mass. 357; Wild *v.* Brewer, 2 Mass. 579; Beck *v.* Metz, 25 Mo. 70; Church *v.* Crocker, 3 Mass. 17.

[60] See Osborn *v.* Jeff. Nat. Bank (Ill.), 4 N. E. 791.

[61] Va. Code, sec. 2527; New York stat., *supra*.

[62] In re Atwood (Utah), 60 St. Rep. 876; Stevens *v.* Shippen, 28 N. J. Eq. 487; Thomas *v.* Black (Mo.), 20 S. W. 657; Tucker *v.* Boston, 18 Pick. 162.

[63] Tucker *v.* Boston, *supra*.

In Virginia and most states the statute requires such intention to appear *from the will itself*.[64] But where the statute does not contain this provision there is conflict of authority as to whether *parol* evidence is admissible to show an intention to disinherit. In Massachusetts, it is well settled that such evidence is admissible.[65] This doctrine is based on the ground that the object of such evidence is to show the existence of a state of facts which the statute requires in order to prevent its operation, and not to *contradict the will.* This view is further supported by the fact that a provision by settlement, may, and in most cases must, be established by evidence *dehors* the will. But in spite of these reasons the rule has not met with favor outside of Massachusetts, and perhaps a few other states. In Georgia, Missouri and California,[66] it is held that extraneous evidence is not admissible to show an intention to disinherit. And this would seem to be the safer rule, as the admission of such evidence opens the door for fraud and perjury on the part of those claiming under the will. Furthermore, it seems to have been a part of the purpose of the statutes to require that the will itself should evidence the intention of the testator to disinherit the after-born child.[67] Accordingly we find in most states that the statute itself requires that such intention appear upon the face of the will.[68]

But even in those states the circumstances surrounding the testator when he made his will are admissible to aid in its interpretation, and if the will, viewed in the light of these circumstances, shows an intention not to make any provision for the after-born child, this is held to be sufficient.[69] If the testator *intentionally* omits an after-born child from his will it makes no difference what was the motive which led him to make the omission. It may have been based upon the erroneous belief that he had already provided for such child by some settlement, or otherwise. Still, if he discovers an unequivocal intention not to give such child anything by the will, the law does not inquire into his reason for so doing.[70]

[64] See extracts from statutes, *supra*; Chicago &c. R. Co. *v.* Wasserman (Mich.), 22 Fed. 872.

[65] Wilson *v.* Fosket (Mass.), 39 Am. Dec. 736 and note. See also, In re Atwood (Utah), 60 St. Rep. 876 and note.

[66] Sutton *v.* Hancock (Ga.), 42 S. E. 214; Pounds *v.* Dale, 48 Mo. 270; In re Garraud 35 Cal. 336, and ca. ci.

[67] Yerby *v.* Yerby, 3 Call, 334.

[68] See extracts from statutes, *supra.*

[69] Leonard *v.* Enochs, *supra*; Hawhe *v.* Chicago &c. R. Co. (Ill.), 46 N. E. 240; Lurie *v.* Radnitzer, 166 Ill. 609.

[70] Hurley *v.* O'Sullivan, 137 Mass. 86.

Having seen now what circumstances must concur in order that the statute may operate, namely, a will, the subsequent birth of a child, such child not provided for by any settlement, not provided for in the will, and not expressly excluded by the will, let us next inquire what is the *effect* of the statute in cases where it applies.

EFFECT OF STATUTE.

The statutes are not all alike in this respect. In Virginia, the first statute (that applying to a case *where there are no children when the will is made*) declares that the

"will, except in so far as it provided for the payment of the debts of the testator, shall be construed as if the devises and bequests therein had been limited to take effect, in the event that the child shall die under the age of twenty-one years of age, unmarried, and without issue." Va. Code, sec. 2527.

Under this statute, if there be a specific devise or bequest for the payment of debts, such devise or bequest will stand. The operation of the other parts of the will, however, is *suspended* until the contingency arises upon which they are to take effect. The will is not *revoked,* but the devises and bequests therein, instead of vesting immediately upon the death of the testator, are construed as executory limitations, to take effect when, and not unless, the pretermitted child shall die under twenty-one years of age, unmarried and without issue. In the meantime, the estate *descends* upon those who are entitled to it under the statutes of Descent and Distribution,[71] that is to say, the real estate (subject to the wife's dower) and two-thirds of the personalty to the pretermitted child, and one-third of the personalty to the widow. But if the pretermitted child die before reaching the age of twenty-one years, unmarried and without issue, then the devisees and legatees become at once entitled to what is given them by the will.[72]

The clause "die under the age of twenty-one years of age, unmarried, and without issue" is believed to mean that the pretermitted child shall not be married, or have issue living, *at his death.* Therefore, if he die leaving a wife, or, his wife being dead, a child, then the will is forever inoperative and void, and the legatees and devisees are forever debarred. The same effect will follow if the child live to twenty-one years of age.

[71] Cunningham v. Cunningham (W. Va.), 5 S. E. 139.

[72] Wilson v. Ott (Pa.), 23 Atl. 843.

It is to be noted that the child takes, not under the will—for nothing is given him therein—but under the statute.[73]

It has been suggested that under the peculiar wording of the Virginia statute, *supra,* such child would take, by implication, under the will. But this cannot be. For, the fundamental idea of a will is that it is the *intention of the testator* as to what shall be done with his property at his death. Therefore, if, as a matter of fact, the after-born child was not within that intention, this is a *fact* which not even the legislature can change.[74]

The statutes of Kentucky, West Virginia and Texas, providing for a case where the testator had no children when he made his will, are substantially the same as that of Virginia which we have just been considering. In Ohio and New Jersey the statute declares that the will shall be revoked, *in toto,* in such cases.

The second Virginia statute (that providing for a case where the testator has children living when he makes his will) declares that the pretermitted child

"shall succeed to such portion of the testator's estate as he would have been entitled to if the testator had died intestate; towards raising which portion the devisees and legatees shall, out of what is devised and bequeathed to them, contribute ratably, either in kind or in money, as a court of equity, in the particular case, may deem most proper." Va. Code, 2528.

Then follows a provision, similar in effect, to that of sec. 2527, *supra,* in the event that the pretermitted child shall die under the age of twenty-one years of age, unmarried, and without issue.[75]

The above is the usual form which this clause has assumed in the statutes of the various states, except that the words "in kind or in money, as a court of equity, in the particular case, may deem most proper" are omitted. This is a wise provision, empowering the chancellor to permit a devisee or legatee to contribute his proportion in money, instead of a part of the *corpus* of the estate given him by the will, in a case where such arrangement is "deemed most proper." Where the statute does not contain this provision, it is held that the pretermitted child is entitled to his proportionate share of the *corpus* of what each devisee and legatee takes under the

[73] Smith *v.* Olmstead (Cal.), 26 Pac. 521.

[74] See concordant Cunningham *v.* Cunningham (W. Va.), 5 S. E. 139.

[75] But this statute, unlike sec. 2527, provides that only so much of the deceased child's portion shall go over "as remains unexpended in his education and support." No reason is perceived for this difference. The two statutes being *in pari materia,* possibly this clause will be construed as belonging to both.

will,[76] and therefore may maintain ejectment or detinue against each devisee and legatee to recover his proportionate part of the estate given to such devisee or legatee by the will.[77]

And, furthermore, it has been held that the pretermitted child may follow the estate in the hands of a purchaser from a devisee or legatee, and this although such purchaser had no notice of the claim of such child.[78] For, the purchaser's title is derived through the will, and the statute makes the will inoperative as to that part which descends to the pretermitted child. So, a sale made by executors, under a power of sale conferred upon them by the will, does not affect the interest of a pretermitted child.[79] Nor does the direction to the executors to sell work an equitable conversion of the interest of such child in the lands of the testator. Thus, in *Northrop* v. *Marquam,*[80] the testator gave all his estate to his wife and three children then living, empowering his executors to sell, pay debts and distribute the residue. Sales were accordingly made, and the purchasers entered upon the land. But, a posthumous daughter being born eight months after the testator's death, it was held that the sale by the executors transferred all that the executors could lawfully sell, but the interest of the after-born child, being excepted out of the will by the statute, remained unaffected by the sale; that since the will was "no will" as to the pretermitted daughter, the direction to the executors to sell, did not work an equitable conversion of *her interest,* but that she might recover her proportionate part of the *land* itself.

The testator's "estate" includes only what belonged to him at his death. Therefore a pretermitted child cannot demand that advancements made by the testator in his lifetime to others of his children be brought into hotchpot for his benefit.[81]

The subsequent birth of a pretermitted (posthumous) child does not affect the validity of the *probate,* but merely operates upon the *effect* of the will.[82]

[76] Smith *v.* Robertson, 89 N. Y. 556.

[77] Pearson *v.* Pearson, 46 Cal. 610. See, as to the whole subject of how contribution is made in such cases, Ward *v.* Ward, 120 Ill. 111.

[78] Haskins *v.* Spiller, 1 Dana (Ky.) 170; Armistead *v.* Dangerfield, 3 Munf. 20.

[79] Smith *v.* Robertson, *supra*; Worley *v.* Taylor (Oregon), 28 Pac. 903. *Contra*, Coates *v.* Hughes, 3 Bin. 495.

[80] (Ore.) 18 Pac. 469.

[81] Wilson *v.* Miller, 1 Pat. & H. 353; Wilson & Fritz, 32 N. J. Eq. 59.

[82] Evans *v.* Anderson, 15 Ohio, 324; Doane *v.* Lake (Me.), 52 Am. Dec. 654.

Here our journey ends, and though the reader is doubtless tired, we beg of him to look once more upon the way over which we have traveled, and to review it briefly.

CONCLUDING SURVEY.

We saw, first, what was the situation before the statute. We saw what was the *evil* of that situation, viz., that children were sometimes *unintentionally* left without any share of their parent's estate, merely from the accidental circumstances of their being born after the making of their parent's wills. Then came the statute, and *remedied* this evil by declaring that a child born after the execution of its parent's will should, nevertheless, have a share in the testator's estate, unless provision shall have been made for such child or an intention shown not to make any provision. And, construing this latter clause with a view to the *purpose* of the statute, we saw that its effect is merely to limit the operation of the statue to the single case which it was designed to meet, viz. : a case of unintentional omission, and, consequently, if it appears that the testator had the after-born child *in mind* when he made his will, the *nature* and *extent* of the "provision" made for such child is immaterial. But while this is the rule prevailing generally throughout the states, in Pennyslvania, Maine and Rhode Island a different rule obtains, by which, in order to prevent the operation of the statute, it is required that some substantial provision be made which will be available as a *present* means of support and maintenance for the after-born child. We saw that this diverse interpretation arose (whether correctly or incorrectly) from the peculiar wording of the statute in those states, which does not, in terms, permit the testator to *disinherit* an after-born child, and which is construed as an exercise by the legislature of its undoubted right to restrict a testator in the disposition of his property.

Considering, then, the *effect* of the statute in a case where it applies, we saw this to be, to give to the after-born child a share in its parent's estate, equivalent to what, by common opinion, as expressed in our statutes of Descent and Distribution, such child ought to have, and such, therefore, as it is probable the testator himself would have given it had he contemplated its birth. And, lastly, we observed that the share of the after-born child in the testator's estate vests in it by *descent,* unaffected by any provisions in the

will; that, in the absence of statutory provision to the contrary, such child is entitled to a proportionate share of the *corpus* of the testator's estate, and consequently may recover such portion by an action *in rem* against any party in possession.

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WOUND IN ONE STATE—DEATH IN ANOTHER—LEGISLATION NEEDED.

In *State* v. *Hall*, 114 N. C. 909, 41 Am. St. Rep. 822, an extraordinary hiatus was shown to exist in our criminal procedure. The facts of the case were as follows: A, standing upon North Carolina soil, shot and killed a man in Tennessee. Being indicted (in a former proceeding) in North Carolina for this killing, it was held in accordance with a great array of authority, that the homicide did not occur in North Carolina, where the gun exploded, but in Tennessee where the bullet took effect.[1] Thereupon the Tennessee authorities sought to have him extradited, and the question before the court was whether such a case came within the scope of the United States Constitution, Art. IV, sec. 2, cl. 2, providing that "a person charged with treason, felony, or other crime, who shall *flee from justice* and be found in another state shall, on demand of the executive authority of the state from which he fled, be delivered up, to be removed to the state having jurisdicition of the crime."

The North Carolina court, it will be remembered, had already declared in the first prosecution that the criminal had committed the offense in Tennessee and not in North Carolina, that he was constructively present with his bullet in Tennessee at the time. Good sense and expediency would both dictate therefore that, being constructively present in Tennessee at the time of the killing, he must have constructively fled from Tennessee in order to be once more in North Carolina, and that he must be considered as falling within the scope of the constitutional provision above quoted. But the North Carolina court held that, never having been in Tennessee, he was not a fugitive from Tennessee, and could not be extradited.

[1] See United States v. Guiteau, 1 Mackey, 498, 47 Am. Rep. 247; Simpson v. State, 92 Ga. 41, 44 Am. St. Rep. 75, and extended note.